No. 84-105

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARTIN FINE, WILLIAM BECKER and PHILIP BECKER, Individually and WILLIAM BECKER and PHILIP BECKER d/b/a BECKER & BECKER, all doing business as 649 BROADWAY EQUITIES CO.,

Petitioners,

– against –

BELLEFONTE UNDERWRITERS INSURANCE CO., CITIBANK, N.A., and JOHANA ZUCKERMAN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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August 17, 1984

COUNTER-STATEMENT OF QUESTIONS PRESENTED

Respondent Bellefonte Underwriters Insurance Co. ("Bellefonte") disagrees with petitioners' contention that "The Second Circuit has repudiated *Erie R.R. Co. v. Tompkins*", 304 U.S. 64 (1938), (Pet. p. 24) and submits that that case is not involved in any way in the questions presented here. The first of the three questions proposed by the petitioners must therefore be rhetorical. The answer, if the question were germane, is obviously "no".

A more accurate statement of the issue involved in the second of the questions proposed by the petitioners would be:

> There being no case in New York, or for that matter anywhere, holding that an insured may give false testimony on a material subject at an examination under oath conducted pursuant to the provisions of the legislatively mandated New York Standard Fire Insurance Policy and still recover for a claim made thereunder unless the insurer can sustain the burden of proving by clear and convincing evidence that the insured lied wilfully, should this Court give consideration to engrafting such a requirement onto the existing law of New York?

A more accurate statement of the issue involved in the third question proposed by the petitioners would be:

> Is the holding of the Second Circuit that false answers at an examination under oath are material if they "concern[ ] a subject reasonably relevant to the insurance company's investigation at the time" [App. B-10] and "might have affected the attitude and action of the insurer...[or] may be said to have been calculated either to discourage, mislead or deflect the company's investigation ..."(App. B-12) in conflict with the decisions of the highest court of New York?

Petitioners' real reason for seeking review by this Court does not involve any of the "Questions Presented" which are set forth in pages i and ii of the petition. In petitioners' petition for rehearing in the Court of Appeals it was represented:

> Petitioner Martin Fine is a lawyer and businessman.
>
> His dealings with associates, third parties and public agencies are directly dependent on his reputation for honesty and fair play.
>
> This Court has, in its recent opinion, publicly branded Martin Fine guilty of perjury and fraud .
>
> From the tone of its opinion it is apparent that the Court gained the impression that Martin Fine was that most despised of human species — a heartless, greedy landlord. Wholely apart from the truth or falsity of that conclusion (which we obviously dispute), the Anglo-American legal tradition accords even the most vile malefactor a fair standard of proof on charges for which he stands accused.

Though these representations are not repeated in the present petition, it seems evident that the primary question presented here is whether this Court should review a unanimous decision of the Second Circuit (which has survived 2 motions for rehearing in that Court as well as a motion for a new trial in the Southern District Court) in order to determine whether or not petitioner should be afforded a forum for attempted personal vindication.

DESIGNATION OF CORPORATE RELATIONSHIPS

Pursuant to Rule 28.1 of the Rules of the Court respondent submits the following statement:

The parent of Bellefonte Underwriters Insurance Company is Compass Insurance Company. The parent of Compass Insurance Company is Armco Inc. Subsidiaries (except wholly-owned subsidiaries) and affiliates of Armco Inc. are: Accerex; Aceros Del Sur S.A.; Aceros Nacionales, S.A.; Allied Investement Corporation; Armco Bundy ApS; Armco-Bundy Ror AB; Armco Industrial S.A.; Armco Industries (Nigeria) Ltd.; Armco Instapanel S.A.; Armco Armcopaxi; Armco Peruana S.A.; Armco (P.N.G.) Pty. Limited; Armco Westeel Inc.; Australian Steel & Mining Corporation Pty. Ltd.; P.T. Bakrie - Armco; Bienes de Capital Imsa, S.A. de C.V.; Big Three Lincoln (U.K.) Limited; Black River Lime Company; Bundy Venezolana C.A.; Carryore, Limited; Chatillon-Armco S.A.; Court Galvanizing, Inc.; Court Galvanizing Limited; D.I.F.S.I.C.A.; Equipetrol Administracao E Participacoes Ltd.; Equipetrol, S.A.; Equipetrol Norte Industria E Commercio Ltd.; Falconbridge Dominicana C. por A.; Charles Fulton (Asia) Holdings Ltd.; Charles Fulton (Australia) Pty. Ltd.; Charles Fulton (Malaysia) Sendirian Berhad; Charles Fulton (Singapore) Holdings Ltd.; Charles Fulton (Singapore) 1982 Ltd.; Herman Smith HITCO Ltd.; IMSA National, S.A. de C.V.; Industrias National Supply C.A.; Inmobiliara Hierro y Accro, S.A.; Mansion Management Services Limited; Marine Mineral Industries, Inc.; Metaltubos C.A.; Middletown Enterprises, Inc.; Minera Cerro de Plata, S.A. de C.V.; Northern Land Company; Nuovi Tubi Brindisi SpA; Obras Civiles e Industrias C.A.; Oregon Metallurgical Corporation; Productos Metalicso Armco S.A.; Prolansa (Productora de Alambres y Derivados S.A.); Limited; State Surety Company; Technocargo-Transportes Especializados Ltd.; Torcad Limited; Winning Post Investments Ltd.

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COUNTER-STATEMENT OF THE CASE

There are a number of inaccurate, overstated or unsupported factual assertions set forth under this heading in the petition many of which are in no way relevant to the questions which

petitioners contend are presented to this Court[1] They appear to have been made in order to create sympathy for Fine personally, the impression that the petitioners have been treated unjustly by the Second Circuit, and that Fine should be afforded a second opportunity to attempt to show that, his institution of a tenant "freeze-out" policy to the contrary notwithstanding, he was not a heartless, greedy landlord.

The more significant inaccuracies which have at least tangential relevance here are as follows:

> 1. "...for the ten days prior to the fire...the furnace was in full operation (except for brief electrical maintenance shutdowns which were immediately repaired) *throughout the entire period*. (A-10, 17)" (Pet., p.8)

At A-9 the District Judge found that from 11 a.m. to 2 p.m. every day, by order of Fine, as well as at other times during the period the furnace did not operate and all three buildings were therefore without heat of any kind.

> 2. ...the trial judge found:
>
> ...
>
> I. "Therefore, the new owners' change in heating policy was *not* the cause of any partial freezing and malfunctioning of the sprinklers" (Pet. pp. 8-9).

In fact the trial judge went no further than to say that "Bellefonte has failed to establish by a preponderance of the evidence that Fine's heating practices were a proximate cause of the failure of the sprinker system to work". (A-13)

3. Referring to the testimony of Fine and his managing agent, it is said at page 9 of the petition:

> "The District Judge found these statements to be 'inaccurate and consequently false' (also describing them as "mistaken")..." (Pet. p. 9) (Emphasis supplied).

See also page 14 of the petition.

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[1]For example, that the cause of the fire was "apparently tenant arson" (Pet. p. 6.). In fact Bellefonte raised no issue as to cause and the petitioners' conclusion as to "tenant arson" is pure speculation, not endorsed by the trial judge or by the Fire Department.

Although the District Judge found "Peter's and Fine's statements with respect to sprinkler maintenance to have been inaccurate and consequently false" (A-14) he stated without any qualification whatever that their testimony as to the heat timer setting was "false" (A-14, 16) and he repeated that finding in his opinion on petitioners' motion for a new trial (C-2). His use of the word "mistaken" was in a somewhat different vein than is suggested in the petition (A-16).

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS, IN REVERSING THE DISTRICT COURT, CORRECTLY APPLIED NEW YORK LAW

Petitioners argue that the Court of Appeals applied its own common law and "brushed aside" the substantive law of New York by eliminating the requirement of "wilfulness" and "intent to deceive" in voiding an insurance policy for false swearing on an examination under oath. (Pet. pp. 11,13) It is claimed that this "dramatic alteration" of the New York Law would allow insurers to avoid coverage because of inadvertent or inaccurate statements on an examination under oath. It is further claimed that the decision establishes a rule of law that enables the insurer alone to determine what is and what is not material (Pet. p. 18).

The decision of the Court of Appeals does no such thing.

The Wilfulness Requirement.

The Court of Appeals decision, in its recital of the factual findings of the Court below, refers to the "obvious theory" being pursued by the insurance company on its examination under oath, suggested by the failure of the sprinkler system to operate during the fire and indications that the insured had followed a freeze-out policy in order to get rid of the tenants in the insured buildings. (B-6) The findings by the Court below, referred to by the Court of Appeals, of repeated instances of false swearing by both Fine and Peters on the examination under oath regarding sprinkler maintenance and heating practices, particularly with regard to the heat timer settings, do not permit

an inference of mistaken recollection; rather, the findings are consistent only with deliberate and wilful false swearing sufficient to void the policy under the "Concealment, Fraud" language of the policy mandated by Section 168 of the New York Insurance Law (quoted in the footnote of the Court of Appeals' decision.) (B-5). The fact that Judge Sweet in the Court below erroneously regarded the false swearing as not being material and therefore had no occasion to make an express finding of "wilfulness" and "intent to defraud" does not mean that the Court of Appeals has eliminated any "requirement" of New York Law in this regard.

Indeed a finding of false testimony reasonably implies wilfulness. The statutory provision (quoted in the Court of Appeals decision at B-5) provides for voiding the policy by reason of "*any fraud or false swearing by the insured*" relating to a material fact. It does not state that it must be wilful false swearing (as it does in the case of concealments or misrepresentations), perhaps because a finding of false swearing implies wilfulness. Here, of course, we have the necessary prerequisite to void the policy by the finding that both Fine and Peters swore falsely on the examination under oath.

One could not reasonably conclude that Messrs. Fine and Peters were honestly mistaken in their identically false answers to questions posed to them on the examination under oath. Both had an obvious interest in persuading the insurer that the buildings were not underheated, and they were well aware that the reason for the practice of setting heat timers at 40 degrees was for the very purpose of protecting plumbing systems and sprinkler systems against freezing. Under these circumstances a finding that the false testimony was not wilfully made would be incongruous,and the District Court made no such finding.

It is simply not so, therefore, as stated in the petition (Pet. p. 13), that "the decision of Second Circuit holds that *any* incorrect answer by the insured...is grounds for voiding a fire insurance policy" nor does the decision equate "wilfully false" testimony with testimony that is "simply mistaken, incorrect, inaccurate, negligent or inadvertent" (Pet. p. 13).

Also the 18th and 19th Century quotations set forth at the bottom of page 15 and top of page 16 of the petition are inapposite. There is no suggestion in the Circuit Court's opinion that the failure of an insured to recollect may be taken to be false swearing as to a material subject. Similarly, there is no suggestion in the Circuit Court's decision that an "innocent mistake" would be taken to be false swearing.

Moreover, though petitioners repeatedly argue that the Court of Appeals' decision is contrary to New York law in that there has been no finding that the false swearing by Fine and Peters was "wilful" and "with intent to deceive", they have not cited a single New York case or a case from any other jurisdiction which has held that an insured may give false testimony concerning a material matter on an examination under oath without voiding the policy unless the insurer can sustain the burden of proving, by clear and convincing evidence, that the insured lied wilfully and with intent to deceive. Though there are cases in New York referring to deliberately, intentionally or wilfully made false statements, they do not support the view that a finding of wilfulness is required[2]. Moreover many of the cases involve false claims made in proof of loss documents[3] and do not address the issue of false swearing in an examination under oath.

Petitioners quote from *Claflin v. Commonwealth Ins. Co.* 110 U.S. 81 (1884) and *Meyer v. Home Ins. Co.*, 127 Wis. 293, 106 N.W. 1087 (1906), cases cited by the Court of Appeals in its discussion of materiality (725 F.2d at 183-184), to the effect that a false answer as to a material fact, wilfully made with intent to deceive, would be fraudulent. Neither opinion says — as petitioners would have us believe — that an express finding of wilfulness is required in order to hold that a false answer

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[2]*See e.g. Oppenheimer v. Washington Assurance Corp. of N.Y.*, 244 A.D. 234, 278 N.Y.S. 798 (1st Dep't 1935); *Kantor Silk Mills, Inc. v. Century Ins. Co., Ltd.*, 223 A.D. 387, 228 N.Y.S. 882 (1st Dep't 1928), *aff'd without opin.*, 253 N.Y. 584 171 N.E. 793 (1930).

[3]*See e.g. Saks & Co. v. Continental Ins. Co.*, 23 N.Y. 2d 161 (1968); *Kantor Silk Mills, Inc., supra*, 223 A.D. 387 (false testimony at examination regarding proofs of loss); *Domagalski v. Springfield Fire & Mar. Ins. Co.*, 218 A.D. 187, 218 N.Y.S. 164 (4th Dep't 1926)

will void policy coverage, and certainly do not say or imply that an insurer who has established false swearing as to a material fact on an examination under oath has, in addition, the burden of proving wilfulness by clear and convincing evidence[4].

Intent to Deceive.

Petitioners' second argument that intent to deceive or defraud must be independently shown is, of course directly contradictory to the *Claflin* decision. There the Supreme Court held that a deliberately false statement on a material matter will void policy coverage even though there is no showing of intention to deceive, "for the law presumes every man to intend the natural consequences of his acts." *Claflin, supra*, 110 U.S. at 94, 28 L.Ed. at 82.

In contrast to their failure to cite any New York authority in support of the alleged wilfulness requirement, petitioners cite two New York cases allegedly supporting the argument that an "intent to defraud" must be shown before an insurance company can void policy coverage under Section 168 of the New York Insurance Law. (Pet. pp. 19-22) The cases, namely, *Jonari Management Corp. v. St. Paul Fire and Marine Ins. Co.*, 58 N.Y.2d 408, 448 N.E. 2d 427 (1983) and *Deitsch Textiles, Inc. v. New York Property Ins. Underwriting Ass'n.*, No. 450, slip op. (New York Court of Appeals, July 2, 1984) are clearly distinguishable.

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[4]Petitioners' cite *C.E.H. McDonnell v. American Leduc Petroleums, Ltd.*, 456 F.2d 1170, (2d Cir. 1972); and *Hutt v. Lumbermens Mutual Cas. Co.*, 95 A.D. 2d 255, 466 N.Y.S. 2d 28, (2d Dep't 1983) for the position that the "clear and convincing" standard of proof is a substantive requirement in New York, neglecting to point out that though such a standard is applicable to cases where fraud is pleaded by a plaintiff as a basis for recovering damages (which is all *C.E.H. McDonnell* stands for), no New York decision prior to *Hutt* ever imposed a "clear and convincing" requirement in a civil action on the New York Standard fire insurance policy. *Hutt* related to an arson defense (which involves "grave charges") and represents a departure from established law in New York since the decision in *Johnson v. Agricultural Ins. Co.*, 25 Hun 251 (4th Dep't 1881) which required that such a defense in a civil action need only be established by a preponderance of the evidence. See *Demyan's Hofbrau, Inc. v. Insurance Company of North America*, 542 F. Supp. 1385, 1386 (S.D. N.Y. 1982), *aff'd.* _____ F.2nd _____, (2nd Cir. 1/6/83) where authorities in many jurisdictions, including particularly New York, are collected on this point.

In *Jonari* the New York Court of Appeals refused to disturb a jury determination that, with respect to a second lease prepared after a fire to support a claim for damage to improvements and betterments (as to which there was testimony that it was prepared for the purpose of reflecting the agreement of the parties imperfectly expressed in the first lease) there was no intent to defraud. The questions presented to the jury pertained 1) to whether there were false and fraudulent statements in the proof of loss and 2) whether the second lease was prepared with intent to defraud the insurer. The Court of Appeals did not address any issue pertaining to false swearing on an examination under oath.

Deitsch involved a consolidated action by a tenant and a building owner against their insurance companies for loss sustained when a fire destroyed a commercial building. As one of their defenses, the defendants sought to vitiate coverage by reason of the insured's alleged fraudulent exaggeration of its damage claim. 93 A.D.2d 853, 461 N.Y.S.2d 353 (2nd Dep't 1983). More specifically, the fraudulent exaggeration involved the extent of the loss claimed by Deitsch Textiles, the tenant. *Id.* The defense of fraudulent exaggeration was dismissed against the tenant and withdrawn against the building owner before trial. The jury rendered verdicts for the tenant and owner. The Appellate Division reversed the judgments and reinstated the defense of fraudulent exaggeration. On appeal, the Court of Appeals reversed the Appellate Division's reinstatement of the defense of fraudulent exaggeration.

The language from the opinion quoted at pages 20-21 of the petition does not support the argument that under New York law a finding of "intent to deceive" is required to void a policy where there is false swearing[5]. A more accurate reading of

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[5]*Cf. Sunbright Fashions Inc. v. Greater New York Mut. Ins. Co.*, 28 N.Y. 2d 563, *affg.* 34 A.D.2d 235, where the Court of Appeals affirmed an Appellate Division decision reversing a decision in the trial court denying summary judgment and granting summary judgment to defendant insurer based on a defense of false testimony on an examination under oath, notwithstanding plaintiff's argument in the court of appeals that defendant had not established intent to defraud (28 N.Y. 2d at 564).

Deitsch would seem to be that "intent to defraud" is a necessary element for voiding a policy where the insured has merely exaggerated the claimed amount of its loss.

Deitsch involved the issue of an exaggeration contained in a proof of loss, a document submitted by an insured to notify the insurer of the nature and amount of its claim. As such, it is entirely different from false swearing in response to a pointed question asked at a formal examination under oath, the transcript of which is presented to the insured with an opportunity to change any answer which should be changed before he signs and swears to it before a notary public. Even if a showing of intent to defraud is required to void policy coverage where the insured has merely exaggerated his claim in a proof of loss, it does not follow that an intent to defraud or deceive must be shown where the insured swears falsely at an examination under oath concerning a material subject with adequate opportunity to further investigate and make any necessary corrections in order to "enable the company to possess itself of all knowledge, and all information as to other sources and means of knowledge, in regard to the facts, material to its rights, to enable it to decide upon its obligations, and to protect it against false claims." *Clafin, supra*, 110 U.S. at 94

In arguing that the Court of Appeals' decision is "out of keeping" with the applicable appellate court decisions of other states, petitioners also refer to cases collected in 13A *Couch on Insurance* 2d §§49A:60-74 and 5A Appleman, *Insurance Law and Practice*, §§3587-3595 (rev. ed. 1970). (Pet. p. 22) The sections in Couch and Appleman relied on by petitioners deal principally with fraud on the part of the insured or claimant in submitting a proof of loss document and are therefore not in point.

In summary, though the statutory provision in New York voids a fire insurance policy "in case of any...false swearing by the insured relating [to any material fact]", and even though there are no New York cases which have held that an insured could give such false testimony and still recover unless the insurer sustains the burden of proving by clear and convincing evidence that the insured lied wilfully, the petitioners urge that this Court engraft such a requirement onto the existing law of New York.

2. THE CLAFLIN FORMULA FOR DETERMINING THE MATERIALITY OF FALSE TESTIMONY ON AN EXAMINATION UNDER OATH ACCORDS WITH NEW YORK LAW

Petitioners both depreciate and rely on *Claflin* in referring to it as an 1884 diversity case applying Minnesota Law on the one hand, (Pet. p. 11), and quoting language from the decision in support of their "wilfulness" "intent to deceive" argument on the other. (Pet. p. 13)

Although the Supreme Court in *Claflin* may have followed Minnesota law the decision has been cited with approval by the New York Court of Appeals (*Saks & Co. v. Continental Ins. Co.*, 23 N.Y. 2d 161, 165, 242 N.E. 2d 833 (1968) and by numerous other New York and Federal Courts applying New York law[6].

As a matter of fact the *Claflin* case has been so generally followed throughout the country that it was referred to as one of the "timeless landmark cases"; in *Chaachou v. American Central Insurance Company*, 241 F.2d 889, 894 (5th Cir. 1957).

The *Claflin* test of materiality of questions on an examination under oath is misrepresented by petitioners as establishing

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[6]*C-Suzanne Beauty Salon v. General Ins. Co. of America*, 574 F.2d 106, 110 (2nd Cir. 1978); *Hudson Tire Mart, Inc. v. Aetna Casualty & Surety Co.*, 518 F.2d 671, 674 (2nd Cir. 1975); *Schmutz v. Employees Fire Inc. Co.*, 76 F.2d 119, 121 (2nd Cir. 1935); *Raives v. Raives*, 54 F.2d 267, 269 (2nd Cir. 1931); *Saks & Co. v. Continental Ins. Co.*, 23 N.Y.2d 161, 165, 295 N.Y.S.2d 668, 671 (1968); *Dyno-Bite, Inc. v. Travelers Companies*, 80 A.D.2d 471, 473-474, 439 N.Y.S.2d 558, 560 (4th Dep't 1981), *appeal dismissed*, 54 N.Y.2d 1027 (1981); *Lentini Brothers Moving & Storage Co. v. New York Property Ins. Underwriting Ass'n.*, 76 A.D.2d 759, 761, 428 N.Y.S.2d 684, 687 (First Dep't 1980), *aff'd*, 53 N.Y.2d 835, 440 N.Y.S.2d 174, 422 N.E.2d 819 (1981); *Pogo Holding Corp. v. New York Property Ins. Underwriting Ass'n.*, 73 A.D.2d 605, 606 (2nd Dep't 1979); *Werber Leather Coat Co., Inc. v. Niagara Fire Ins. Co.*, 254 A.D. 298, 300, 5 N.Y.S.2d 1, 3 (2nd Dep't 1938); *Domagalski v. Springfield Fire & Marine Ins. Co.*, 218 A.D. 187, 190, 218 N.Y.S. 164, 166 (4th Dep't 1926); *Wehle v. U.S. Mut. Accident Assn.*, 11 Misc. 36, 40, 31 N.Y.S. 865, 867 (N.Y. Super Ct. 1895) *aff'd*, 153 N.Y. 116, 47 N.E. 35 (1897).

"an irrebutable presumption that if the insurance company asks the question, the answer is 'material' " (Pet. p. 13) or expressed another way, as establishing a rule of law which "permits the insurance company to determine what is and is not material" (Pet. p. 18). These statements are a gross distortion of the *Claflin* rule and the decision of the Court of Appeals in this case.

Under that rule only a question on an examination under oath which seeks information which the court finds to be reasonably relevant and pertinent in order to enable the company to determine its liability under the policy is considered material. In addition, the *Claflin* Court quite reasonably held that given a false statement with respect to a material matter, wilfully made, "the intention to deceive the insurer would be necessarily implied". *Claflin, supra*, 110 U.S. at 94.

That the insurer is not given such irrebutable discretion to determine materiality is evident from the decision of the Circuit Court. The Circuit Court said (B-10) that the subject of the inquiry must be "reasonably relevant to the insurance company's investigation at the time". Also, on the same page the Circuit Court said that "the materiality requirement is satisfied [only] if the false statement concerns a subject relevant and germane to the insurer's investigation as it was then proceeding".

The court then elaborated on the application of this standard as follows:

> False sworn answers are material if they might have affected the attitude and action of the insurer. They are equally material if they may be said to have been calculated either to discourage, mislead or deflect the company's investigation in any area that might seem to the company, at that time, a relevant or productive area to investigate. (B-12)

From the foregoing it may be seen that after considering the standards set forth in the *Claflin* case the Court determined that the questions were material and did not base its decision of materiality merely on the fact that the questions had been asked by the insurer's representative.

Claflin also stands for the well-recognized rule, accepted by the Court of Appeals in this case, that the materiality of the false statements is not dependent upon the ultimate determination of the facts, and the insurer need not establish a causal relationship between the subject of the false statements and the loss. Petitioners do not seem to refute this rule, confining their argument on "materiality" to the erroneous assertion that the determination of materiality is a question of fact which should be left to the finder of the facts (Pet. pp. 22-24).[7]

3. MATERIALITY IS A MIXED QUESTION OF LAW AND FACT

Petitioners assert that New York cases have uniformly left the determination of "materiality" to the finder of the fact, rather than treating it as a matter of law or a mixed question of law and fact, as the Court of Appeals did (Pet. p. 22; B8-9).

Petitioners place principal reliance on *Porter v. Traders Ins. Co.*, 164 N.Y. 504, 58 N.E. 641 (1900) even though in the quotation from that case set forth at page 23 of the Petition the New York Court of Appeals acknowledged that the materiality of a question on an examination under oath is a "question of fact *or a mixed question of law and fact*". If it were such a mixed question, the Second Circuit recognized (fn 7), that it would not be precluded from making its own independent determination. Moreover, in this particular instance, because the finding of false swearing was not attacked, the court below determined that the question was purely one of law (B-9).

Happy Hank Auction Co. v. American Eagle Fire Ins. Co., 1 N.Y. 2d 534, 136 N.E.2d 842 (1956) and *Sebring v. Fidelity-Phoenix Fire Ins. Co.*, 255 N.Y. 382, 174 N.E. 761 (1931) do not preclude determination of materiality by the Appellate Court under these circumstances. *Happy Hank* involved the question of whether the insured was required to provide tax returns requested on an examination under oath, and the New York Court

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[7]And, of course, their further erroneous construction of the Court of Appeals decision as making the insurance company the sole judge of materiality (discussed *supra*. p.10)

of Appeals held that there was a factual question as to whether there was a wilful and fraudulent withholding of material information which could not be resolved by affidavits on a summary judgment motion. The *Sebring* case involved materiality of a representation in procuring the policy, which is dependent on whether or not, with knowledge of the facts, the underwriter would have accepted the risk. The Court of Appeals decision states merely that "materiality of a representation or concealment is *ordinarily* for the jury". 255 N.Y. at 385

Actually, New York appellate courts have not hesitated to reverse lower court decisions and to rule as a matter of law that fraud and false swearing by an insured pertaining to matters considered material by the appellate court voided a property insurance policy. See *Sunbright Fashions v. Greater N.Y. Mutual Ins. Co., supra*, 34 A.D.2d 235, aff'd, *28 N.Y.2d 563 (1971) (cited in Petition at p. 20); Saks & Co. v. Continental Ins. Co., supra*, 26 A.D.2d 540, *aff'd*, 23 N.Y.2d 161 (1968); (also cited in Petition at p. 20); *Kantor Silk Mills Inc. v. Century Ins. Co., supra*, 223 A.D. 387, *aff'd*, 253 N.Y. 584 (1930); *Werber Leather Coat Co. v. Niagara Fire Ins. Co.*, 254 A.D. 298, 5 N.Y.S.2d 1 (2nd Dep't 1938); and *Columbia Corporation Inc. v. Insurance Co. of N. America*, 213 A.D. 798, 211 N.Y.S. 198 (1st Dep't 1925).

4. THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR GRANTING CERTIORARI IN THIS CASE

This case does not fall within any of the considerations listed in Rule 17 which may lead the Supreme Court, in the exercise of its discretion, to grant certiorari and the petition should be denied in that:

a) there is no question of federal law involved,

b) the issues relate solely to the law of New York and construction of provisions of the New York Insurance Law, and are not of sufficient national importance to warrant this court's attention, and

c) the Court of Appeals gave full consideration to the issues and its decision does not conflict with decisions of the New York State Court of last resort.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.
Dated: August 17, 1984

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